SUPREME COURT, U. S.

APR 25 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1217

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Petitioner,

—against—

UNITED FRUIT COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent-defendant United Fruit Company (*"United"*) opposes the petition of International Railways of Central America (*"Railways"*) for certiorari to review the decision of the United States Court of Appeals for the Second Circuit. In affirming upon the ground of the statute of limitations the District Court's (Ryan, Ch. J.) grant of partial summary judgment in favor of United, the Court of Appeals reversed in part and in part did not reach the second ground, the rule barring splitting of claims, upon which the District Court's judgment was also based. Should this Court grant this petition, we submit it should have fully before it both bases of the District Court's judgment and be in a position to modify the Court of Appeals' judgment. Accordingly, in No. 1320, United has cross-petitioned for a writ of certiorari, to be granted only in the event the Court grants the petition in No. 1217. Our request that the Court deny the petition herein (No. 1217)

rests on the grounds first, petitioner's claim concerning the statute of limitations is without merit and does not warrant review by this Court, and second, the judgment of the Court of Appeals must in any event be sustained on the alternative ground of the rule against splitting claims, discussed in full in United's cross-petition in No. 1370.

Question Presented

Where representatives of the plaintiff, including its stockholders at a regularly convened stockholders' meeting, counsel for minority stockholders, and independent members of the board of directors, were advised of the circumstances underlying petitioner's claims and such stockholders actually instituted separate suits on the same facts but different legal theories more than four years before the filing of this action, was it error for the courts below to apply the four-year statute of limitations (15 USC § 15b) in dismissing so much of those claims as accrued before February 16 1961?

Statutes Involved

The pertinent statutes are §§ 1 and 2 of the Sherman Act (15 USC §§ 1 and 2) and §§ 4b and 7 of the Clayton Act (15 USC §§ 15b, 18); said statutes are reproduced at pp. 26a-30a of Appendix C to the petition herein.

Statement of Case

On February 16 1965 Railways brought this action asserting, in its amended complaint, six causes of action. Five are for treble damages under the antitrust laws. One (the fifth) is for alleged breach of contract. The total trebled damages claimed are $507,000,000. After pretrial discovery, United moved for partial summary judgment to dismiss a majority of Railways' claims and Railways cross-moved for partial summary judgment on the same claims.

Both motions were based broadly upon the prior *Ripley* litigation in the New York State courts. United's motion was based upon (a) the rule against splitting of claims and (b) the statute of limitations with respect to matters accruing more than four years before the filing of the complaint.

Railways' cross-motion was based upon the theory that as to substantially all of the claims (except the fifth, for breach of contract) the facts were found in its favor in *Ripley* and that defendant is estopped from denying those claims.

The District Court granted United's motion on both grounds asserted and denied Railways' cross-motion. Railways appealed and the Court of Appeals for the Second Circuit affirmed the judgment below, on the ground of the statute of limitations, insofar as it barred claims accruing more than four years prior to the commencement of this action, *i.e.* before February 16 1961. That Court therefore found it unnecessary to consider whether the rule against splitting of claims also barred Railways' claims accruing before February 16 1961. However, the Court of Appeals went on to consider whether such rule barred claims accruing after February 16 1961, and finding that such claims were not barred it reversed the decision below to the extent that it barred claims accruing after February 16 1961.

1. *Ripley* v. *International Railways of Central America and United Fruit Company* 8 AD 2d 310, aff'd 8 NY 2d 430

The Court of Appeals succinctly described the events immediately preceding the *Ripley* litigation (App. 5a):[1]

> "In May, 1948, meetings were held between an attorney representing IRCA stockholders, and the

[1]References such as above are to the opinion of the Court of Appeals appended at pp. 1a-23a to the petition herein.

President and Chairman of the Board of IRCA, to consider IRCA-UF relations and rates. When the conferences proved unproductive, Ripley and other stockholders represented by the attorney brought a derivative action in the Supreme Court, New York County, in February, 1949."

This was a minority stockholders' action commenced on behalf of Railways by stockholders, ultimately numbering 27, alleging domination and control of Railways by United, which at that time owned approximately 42% of the stock of Railways and alleging abuse by United of its resultant fiduciary obligations through under-payment of freight rates and in other ways summarized in the moving affidavit of Porter R. Chandler (par. 7; I—29a-30a).[2]

Four of the six attorneys who now represent Railways before this Court appeared and participated actively for Railways' stockholders throughout the *Ripley* case[3] which resulted in a judgment for the benefit of Railways of $4,531,055.38 as of January 2 1958. This judgment together with interest and future payments provided for, caused United to pay to Railways $9,139,596.42 on March 1 1961, and thereafter additional amounts (which are still being paid) by virtue of the increased scale of charges fixed by the court (I—30a). The immense scale of the *Ripley* trial was noted in Judge Ryan's opinion (I—6a, 9a-10a) and is set forth in pars. 8 and 9 of the Chandler affidavit (I—30a-32a). After judgment the successful plaintiffs' attorneys demanded an allowance of $8,940,600 as compensation for their services. Of this enormous sum

[2]References such as above are to Roman numbered volumes of Railways' appendix in the Court of Appeals and the pages therein.

[3]They are Messrs. Lewittes, Leventritt, Bush and Bender. A fifth member of Railways' present counsel (Mr. Abraham K. Weber) was substituted as attorney of record for Railways in the *Ripley* case itself on January 10 1961.

$5,175,000 was requested by the group of attorneys of which some of the present attorneys for Railways were members—a demand ultimately cut down by the courts to $1,500,000 (I—32a).

2. The Present Litigation

The Court of Appeals (App. 6a) thus described the circumstances leading to the commencement of the present litigation:

> "In preparing for and conducting the trial of the *Ripley* action, an attorney for the plaintiff stockholders became aware of evidence which in his view demonstrated antitrust violations by UF, and mentioned this to a Justice Department attorney toward the end of 1951. In 1954, the United States filed a civil complaint under the antitrust laws against UF in the Eastern District of Louisiana. This action terminated early in 1958 in a consent decree, one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. In January, 1962, UF sold substantially all such stock to BSF Company which in turn sold the great bulk of this to Trans Caribbean Airways; the latter has purchased additional stock so that it owns 340,000 of IRCA's 500,000 shares of common. Later, UF advised it was abandoning Tiquisate [its plantation in western Guatemala] and would no longer ship bananas from western Guatemala over IRCA, as the latter claimed it was bound to do through 1967. IRCA then sought the advice of attorneys who had been of counsel to the *Ripley* plaintiffs. This action followed, on February 16, 1965."

In addition to the attorneys for the *Ripley* plaintiffs, it should be noted that another of the Railways' present

attorneys (Mr. Weber) had represented Railways directly since January 10 1961, and had been its attorney of record in the closing stages of the *Ripley* case, including the entry of the final *Ripley* judgment and the extended hearings which followed on the fee applications in that case.

The present amended complaint charges, in substance, that the same acts which were claimed as breaches of fiduciary duty in *Ripley* also constituted violations of the antitrust laws (except for the fifth claim; II—31-2, which is for breaches of contract, some of which are said to have occurred after the *Ripley* decision). It asks total treble damages of $507 million, less a credit for the $9 million-odd paid under the *Ripley* judgment.

On the basic identity of the present case with *Ripley*, Judge Ryan found (I—11a):

> "We find that the facts presented to the New York court in the Ripley case were substantially the same as those presented by this litigation."

3. Antitrust Claims Arising in *Ripley*.

On the specific question of the antitrust claims in *Ripley* Judge Ryan found (I—10a):

> "A review of the Ripley record reveals that the New York Court did not consider or rule upon the Federal antitrust violations alleged in the present action for the purposes of determining whether any such violations were present. Nevertheless, the facts on which a federal court might have made such a finding were before the Court."

As illustrations, he then quoted specific references to alleged monopolistic and anti-competitive practices from the *Ripley* pleadings and the Referee's Report (I—10a-11a). Indeed, Railways in its petition before this Court provides

numerous instances of alleged antitrust violations found in the *Ripley* record (Pet., pp. 7-14).

In affirming Judge Ryan on the basic identity of the facts before the New York courts and the claims before this Court, the Court of Appeals held, per Friendly, J. (App. 19a-20a):

> ". . . The gravamen of the *Ripley* complaint was the unduly and discriminatorily favorable rates accorded UF on its own shipments (the claim asserted as Second in the instant action) and the rate divisions on coffee exports and commodity imports; nothing in it can fairly be read as raising the claims now asserted as First or Fourth, and the Sixth is a different ground for damage claims previously asserted. The proof, however, appears to have taken a wider range and the Referee made many findings relevant to what are now the First and Fourth claims, although he repeatedly made clear, as did the New York Court of Appeals, that claims for violations of the antitrust laws were not at issue."

4. Railways' Knowledge Circa 1950 of Alleged Antitrust Violations

At the outset we emphasize that no question of tolling by reason of fraudulent concealment[4] is here involved. At the argument in the District Court, Railways' counsel thus formulated the issue:

> "We are not claiming tolling of the statute of limitation because of concealment. We are claiming toll-

[4]The two cases cited in the footnote to the petition herein at p. 26 (*Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (CA 8 1962) and *Westinghouse Electric Corp.* v. *Pacific Gas & Elec. Co.*, 326 F. 2d 575 (CA 9 1964)) were both fraudulent concealment cases.

ing of the statute of limitations for the entirely separate ground of adverse domination of International Railways of Central America by the United Fruit Company."

The moving affidavit of Porter R. Chandler (I—26a, et seq.) and the deposition of M. Victor Leventritt (D. App. 1a-48a)[5], one of petitioner's principal lawyers both in *Ripley* and here, demonstrate the widespread knowledge among Railways' lawyers and stockholders of alleged antitrust violations by United.

The first of the minority stockholders who sought counsel and ultimately obtained representation by Railways' present attorneys in *Ripley* complained as early as March 29 1950 at the Railways' stockholders' meeting of "restraint of trade" by United in Guatemala with respect to the banana traffic (I—35a). In describing his services in the *Ripley* case Mr. Berner, chief of the staff of which petitioner's present attorneys were members, declared that he considered it his "duty as general counsel to press any legitimate claims of the railroad" (I—32a). He went on to illustrate the restraints of trade, discriminatory practices, and attempted domination of Guatemalan production which he brought out in *Ripley* and which are the main theme of the present action (I—35a, et seq.). Numerous findings both sought by and granted to *Ripley* plaintiffs on behalf of Railways, as set forth at I—36a, et seq. are redolent of the antitrust violations which are again charged in the present amended complaint. Decisions in the antitrust field were proffered by the *Ripley* plaintiffs to the court (I—39a).

More importantly, Mr. Leventritt admitted on deposition in the case at bar that the matter of prosecuting on

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[5]References such as above are to United's appendix in the Court of Appeals.

behalf of Railways the alleged antitrust violations of United came up at some time in the long history of *Ripley*. At D. App. 26a-27a he said:

> "Q. Did you think as a participant in the Ripley case during its preparation and trial, that antitrust violations by the defendant United Fruit existed?
>
> A. Yes.
>
> Q. Did you give consideration as to whether recovery could be made in the Ripley case in the State Court for those antitrust violations?
>
> A. I think we did.
>
> Q. What conclusion did you reach?
>
> A. According to my recollection, we concluded that the proper forum for such an action was the Federal Court rather than the State court.
>
> . . . . .
>
> I was asking you, Mr. Leventritt, as a lawyer in the *Ripley* case, *whether you gave consideration and your colleagues gave consideration to the point.*
>
> MR. BENDER: Gave consideration to what?
>
> MR. CARSON: *To advising your clients to bring the antitrust claim at that time in the Federal Courts.*
>
> A. I think we did." (Emphasis added)

The evidence on this subject was summarized, and additional items of Mr. Leventritt's deposition were cited by Judge Ryan at I—16a:

> "The exhibits presented to the Court indicate that the *Ripley* plaintiffs had knowledge of the antitrust violations some time before 1953. At least some of the attorneys for the present plaintiff also represented the plaintiffs in *Ripley*. M. Victor Leventritt, Esq., is one of the attorneys who participated in the *Ripley* litigation for the plaintiffs and

> is one of the leading attorneys for the plaintiff in this suit. He has indicated that he and his associates had concluded at least by 1953 'that the United Fruit had committed various violations of the antitrust laws in relation to the subject matter of the *Ripley* action (p. 47 deposition of M. Victor Leventritt [D. App. 29a]. Furthermore, he testified to having suggested to a member of the Antitrust Division of the Department of Justice that they 'could very easily prove a case against the United Fruit Company' (Id. p. 67) [D. App. 40a]. Surrounding circumstances indicate that this suggestion was made some time in December 1951."

The Court of Appeals affirmed these findings (App. 6a).

5. The 1952 Railways' Stockholders' Meeting

At the 1952 annual meeting of Railways' stockholders (some three years after the *Ripley* case had been started, over a year before the *Ripley* trial started, and almost 13 years before the filing of the present amended complaint) the *Ripley* plaintiffs and their supporters conducted a highly publicized proxy fight against United. This proxy fight is referred to as follows in plaintiffs' Finding B143 in the *Ripley* case (II Ripley Record ff. 132, appearing also at III—35a):

> "B143. In 1952, when an opposition slate of directors were proposed by independent stockholders of IRCA, the publicly-held stock was voted 4 to 1 in favor of that slate; United's shares were still a majority of those voted and the opposition slate was defeated.
>
> REF. PX 679A (IRCA Minutes Annual Meeting 3/26/52)."

Plaintiffs' Exhibit 679A in *Ripley*, cited by plaintiffs in support of this finding, is the transcript of the annual meeting of Railways' stockholders held on March 26 and 27 1952, a copy of which is included in United's appendix in the Court of Appeals, pp. 56a-130a. The meeting was attended by three attorneys representing various *Ripley* plaintiffs, all of whom repeatedly aired their views on the controversies involved in the present case.

It was also attended by at least four of the *Ripley* plaintiffs, two of whom likewise spoke repeatedly and questioned the management on various aspects of those controversies. The whole tenor of the meeting was an extended attack by a large group of Railways' stockholders upon United, based upon all of the grounds now asserted in the case at bar.

District Judge Ryan found as follows concerning the 1952 stockholders' meeting (I—20a-21a):

> "In fact, one of the independent directors was on a slate of directors proposed by and including several *Ripley* plaintiffs at the 1952 IRCA annual meeting of stockholders. This slate, which was defeated in 1952 after a bitterly contested proxy fight, had the overwhelming support of the stockholders other than United. The bitterness of the meeting, the publicity of the proxy fight, the support given to the opposition slate of directors and the number of named plaintiffs in the *Ripley* suit are all factors which indicate that there was widespread knowledge among IRCA stockholders of United's wrongdoings."

The Court of Appeals affirmed these findings (App. 9a) and found petitioner "not disputing that sufficient knowledge of the claims existed long before 1961."

6. The *Henis* Litigation

Mr. Leventritt was also familiar with the institution of a separate action on some of the same claims as were involved in *Ripley,* brought by one of the *Ripley* plaintiffs and another Railways stockholder against United's subsidiary Compania Agricola in the United States District Court of Delaware on March 30 1953 (D. App. 30a-34a) referring to *Henis* v. *Compania Agricola,* 116 F. Supp. 223, aff'd, 210 F. 2d 950 (CA 3 1954): *cf.* Chandler affidavit (I—33a-34a).

The *Henis* complaint involved, *inter alia,* an attack on the 1936 acquisition by Agricola of the same 185,000 shares of Railways' stock which is now attacked as a violation of the Clayton Act in paragraphs 20 and 80 of the present amended complaint (II—9, 33). Thus, during the pendency of the *Ripley* proceedings, one of the *Ripley* plaintiffs actually exercised his right to go into a Federal court having jurisdiction over antitrust claims.

7. Independent Railways' Directors

The record amply proves (I—127a-132a), petitioner concedes (Pet. pp. 18-19), and the District Court (I—20a-21a) and the Court of Appeals (App. 9a-14a) found that in 1959 three directors were elected to the board of directors of Railways who were independent of United and not dominated or controlled by it in any way. They were Messrs. Yaeger[6]—presently Chairman of the Board and President of Railways—Cunningham and Ruckle. The Court of Appeals found (App. 14a (n. 7)):

> "Ruckle regularly gave information to aid Price, another IRCA stockholder elected a director in 1961,

[6]Note 2 to the Court of Appeals opinion at App. 9a erroneously implies that Mr. Yaeger left the Board in 1963. It is undisputed that he is still a member.

> in a derivative suit claiming interference by UF with a program of dieselization of IRCA. The record also shows that in 1959 Ruckle, Cunningham and Price met with the attorney for Ripley to discuss the railroad's operation."

Moreover, Ruckle gave inside information of the proceedings of Railways' board meetings not only to Price, but also to Sidney Bender, Esq., a member of the staff of the general counsel for the *Ripley* plaintiffs and now of counsel for the petitioner herein (I—129a).

As to the independence of these directors the District Court held (I—20a):

> "In the present suit, there can be no dispute that at least one and probably three independent directors have served on the board of directors of IRCA since 1959."

The Court of Appeals affirmed (App. 9a, 14a).

Manifestations of the independence of Railways' board were apparent almost a year before the election of Messrs. Yaeger, Cunningham and Ruckle in May 1959. Indeed, by notice of appeal dated January 15 1958 (I Ripley Record ff37-41) Railways appealed Referee Hammer's report and decision in *Ripley* "on the ground of inadequacy of the damages awarded" (I—94a) to Railways. The position of the management of Railways *at that time* is stated in its brief dated July 3 1958 filed on its appeal to the New York Supreme Court, Appellate Division. There, through its counsel, it stated:

> "After the Referee's decision, the position of the management of Irca [Railways] necessarily had to be reexamined in the light of that decision, and

the management, with advice of counsel, did make such reexamination.

The result of that reexamination is that Irca appears in this Court as an appellant from the judgment below on the ground that the damages awarded against United are inadequate.

. . . . . .

The management of Irca must always act, as it has always tried to act, solely in the interest of that corporation. We have, therefore, as its counsel advised that the judgment below should be supported and increased, so far as the efforts of Irca management may properly urge such increase". (I—96a-97a).

On the above facts the District Court held (I—21a):

"We find that IRCA had the requisite knowledge to bring suit against United for antitrust violations; that they had the ability to and did in fact sue United; and that at the very least the statute of limitations should not be tolled beyond the election of independent directors in 1959."

This finding was affirmed by the Court of Appeals (quoted at p. 19 below).

Argument

Upon the above-described facts, found by the courts below, respondent United submits that the petition should be denied because the two lower courts correctly decided the questions sought to be raised by Railways in its petition, because the decisions involved no more than application of a settled principle concerning the statute of limita-

tions to particular complex facts, and because partial summary judgment in favor of United is warranted on the alternative ground of the rule against splitting claims.

1. The decisions below are supported by a well-established body of law, including decisions by this Court, that a plaintiff who seeks to toll the statute of limitations on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." *Payne* v. *Ostrus* 50 F. 2d 1039, 1042 (CA 8 1931).

Such was the holding in *Curtis* v. *Connly*, 257 US 260 (1921), not even cited in the petition herein. That was an action brought by a receiver of a national bank to recover from former directors for certain improprieties. Defendants pleaded the statute of limitations which this Court held would not be tolled (257 US at 263-4).

> "Three new directors came upon the board before August 3, 1910. . . . They came to the board as the eyes of the bank. Anyone of them having notice was bound to do what he could to avert or diminish the loss. Indeed the bill seeks to charge one of them for not having done his duty. Notice to an officer, in the line of his duty, was notice to the bank. A single director like a single stockholder could proceed in the courts. *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 381, 403."

The Circuit Courts have consistently followed this holding in those cases where it has been established that the defendant's control over the corporation was less than complete. *Payne* v. *Ostrus* 50 F. 2d 1039 (CA 8 1931); *McNair* v. *Burt* 68 F. 2d 814 (CA 5 1934); *Farmer* v. *Standeven* 93 F. 2d 959 (CA 10 1937); *Anderson* v. *Gailey*

33 F. 2d 589 (ND Ga. 1929). Cf. *Michelsen* v. *Penney* 135F. 2d 409, 416 n.2 (CA 2 1943).

The facts and findings of the courts below properly applied the principles of these cases to the suit at bar.

This emerges from the facts as already stated and from the opinions of both lower courts. But to re-emphasize the main points: First, it is undisputed that from at least 1959 onward there were present three independent directors with full knowledge of the alleged antitrust claims and ability to sue upon them. Second, it is undisputed (a) that from at least 1949 there was at all times a host of highly independent stockholders who brought both the *Ripley* action in the state court and the *Henis* action in the Federal court on facts identical to those grounding the present complaint and (b) that from at least the time of the 1952 election those facts had been made known to all stockholders as a class.

This Court's decision in *Curtis* v. *Connly* stands for the proposition that knowledge by *either* independent minority directors *or* the stockholders as a class is sufficient to start the statute running. Here *both* factors were present.

On the latter factor, the relevant rule is stated by the Fourth Circuit in *White* v. *FDIC* 122 F. 2d 770, 775 (CA 4 1941) cert. denied 316 US 672 (1941):

> "It is argued that the statute did not run in favor of the directors because, it is said, they controlled the corporation through a majority of stock ownership and control of the directorate and there was consequently no one to sue them. It is clear, however, that suit in behalf of the corporation could have been brought by any of the independent stockholders. Curtis v. Connly, 257 U. S. 260, 42 S. Ct. 100, 66 L. Ed. 222; Hughes v. Reed, 10 Cir., 46 F. 2d 435; McNair v. Burt, 5 Cir., 68 F. 2d 814,

815; Anderson v. Gailey, D. C., 33 F. 2d 589, 592; Mobley v. Faircloth, 174 Ga. 808, 164 S. E. 195, 83 A. L. R. 1201 . . ."

2. Railways in its petition herein does not address itself to the principle of these cases. Instead, it repeatedly misrepresents, quotes out of context (Pet. pp. 2, 16, 17, 18) and characterizes as a crucial "concession" two sentences from the brief of United in the Court of Appeals. Since petitioner attempts to make so much of these two sentences, we must quote and reaffirm the full context. At pp. 55-6 of our brief below we said:

> "Appellant attempts to counter this argument by referring (br. 45 and elsewhere) to the findings of 'domination' which were made in *Ripley*. Such a reference misses the point. The 'domination' found in *Ripley* was the kind of domination which the New York courts held was sufficient to impose upon United a fiduciary duty to Railways and its other stockholders. Having established the existence of a fiduciary relationship, the New York courts then went on to declare that the contracts between the parties were unfair to Railways and that their terms should be adjusted accordingly. That kind of domination, which the New York courts held sufficient to establish a fiduciary duty, we submit, is altogether different from the complete control which may be sufficient to toll the running of the statute of limitations.* We may concede for present purposes (as *Ripley* determined) that United dominated Railways to such an extent as to become accountable to Railways on a fiduciary basis. We may even concede for present purposes that the

*Petitioner quotes only the two sentences between the asterisks.

degree of 'domination' found in *Ripley* may have been sufficient to prevent Railways from bringing an action in its own name, as the Appellate Division pointed out in the quotation at appellant's br. 45-6.* But even that kind of domination did not prevent the *Ripley* stockholders from suing; nor would it have prevented either the *Ripley* stockholders or (after 1959) the independent *Ripley* directors from suing on Railways' behalf on the present claim. Under the *Curtis* doctrine (whatever the fiduciary relationship involved) the statute of limitations accordingly was not tolled."

The holding of the Appellate Division in *Ripley,* referred to in our brief below and twice quoted in the petition herein (pp. 18 and 32a), was contained in an opinion dated June 23 1959 (8 AD 2d 310); based upon a judgment entered December 19 1957 (I—167a-175a), on the basis of a trial record that was closed on January 4 1956 (Report of Referee Hammer dated June 27 1957, p. 2). Whatever may have been the "domination" which was held in *Ripley* to give rise to a fiduciary duty before 1956, or even thereafter, has no relevance to the present question whether there existed from at least 1959 onward such "full, complete and exclusive control" as alone would suffice to toll the running of limitations. On that question our position, already discussed, is that there was no such tolling because (a) even before 1959, and regardless of "domination" as a fiduciary, the Railways stockholders were in a position to sue and did sue and (b) from at least 1959 onwards there were also present independent directors with full knowledge and ability to sue.

We stress again that, apart from the correctness of the decision on this issue, it involved no more than the application of an established legal principle to a particular

complex of facts not likely to be repeated and does not warrant review by this Court.

3. The procedural question as to who might have been the named plaintiff or plaintiffs in a suit brought on behalf of Railways is of no basic importance. The suit would in any event have been brought on Railways' behalf and for its benefit. The District Court, while holding that under the *Ripley* decision United "controlled" the Railways even through 1961, nevertheless found and held (I—21a):

> "... that IRCA had the requisite knowledge to bring suit against United for antitrust violations; that they had the ability to and did in fact sue United; and that at the very least the statute of limitations should not be tolled beyond the election of independent directors in 1959."

The Court of Appeals affirmed this holding, saying (App. 18a):

> "Since IRCA has not met its burden of demonstrating that after the election of the three independent directors in 1959, UF had such 'full, complete and exclusive control' as to rule out the possibility of a corporate suit against it, on the demand of a stockholder or directors, for antitrust violations the facts giving rise to which had become well-known, any tolling of the statute ended at least by that time. In consequence the District Court properly held that all claims under the antitrust laws arising prior to February 16, 1961, were barred by limitations."

We submit that these holdings were correct.

4. This Court should also refuse the writ sought by Railways inasmuch as the decisions below are sustainable

upon the alternative ground of the bar against splitting of claims upon which alternative basis the District Court granted United's motion for partial summary judgment. The Court of Appeals rejected in part and in part declined to consider United's contentions in this regard in view of its decision on the statute of limitations. United's contentions in this respect are set forth in its conditional cross-petition filed in No. 132 at this term.

5. Contrary to the contentions of petitioner (Pet. p. 15) the petition herein presents no novel questions of general importance. The general principles enunciated above are well-established and their application by the Court below to the unusual facts of this case was entirely proper.

Such cases as *Poller* v. *Columbia Broadcasting System* 368 US 464 (1962) and *White Motor Co.* v. *US* 372 US 253 (1963) cited by petitioner (Pet. pp. 3, 16-19, 22, 23) relative to the use of summary judgment in antitrust cases have no application where (1) as here, petitioner cross-moved for summary judgment thereby asserting that as to his claims there were no triable issues of fact and (2) as here, summary judgment was based upon specific statutory defenses, not upon the merits of the claims "where motive and intent play leading roles" (368 US at 473)[7]. In addition it should be noted that both those cases were decided before the recent amendment to Rule 56(e) of Rules of Civil Procedure, effective July 1 1963, requiring, in substance, an adverse party to set forth in answering papers, specific facts showing there are genuine issues for trial. This petitioner failed to do. It makes no

[7]See *Ash* v. *I. B. M.* 384 US 927 (1966) where certiorari was denied to review a judgment dismissing the complaint in a derivative antitrust suit upon motion attacking plaintiffs' standing to sue derivatively.

contentions before this Court that there are any such issues for trial.

Burnett v. *New York C. RR Co.* 380 US 424 (1965) and *Glus* v. *Brooklyn Eastern D. T.* 359 US 231 (1959), also cited by petitioner (Pet. pp. 3, 16-17, 23-24, 26), both F. E. L. A. cases, are also clearly inapplicable. In *Burnett,* the plaintiff had instituted timely action in the state court, which had been dismissed on a technical question of venue, and had promptly re-instituted suit in the Federal court. In *Glus,* an uncontradicted allegation in the complaint that defendant had misrepresented to the plaintiff that his time to sue was still open, was held sufficient to withstand a motion to dismiss. Here the plaintiff, its directors and its stockholders, for the reasons stated above, all had ample opportunity to initiate this action within the period of the statute of limitations.

6. Petitioner's final argument that it should have been granted partial summary judgment is without any merit; it was rejected by both courts below and is fully answered by the opinion in the Court of Appeals.

Conclusion

For the reasons stated above, the petition should be denied.

Dated: New York, New York
April 24 1967

Respectfully submitted,

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